

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
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Implementation of the)
Telecommunications Act of 1996)
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Amendment of Rules Governing)
Procedures to Be Followed When)
Formal Complaints Are Filed)
Against Common Carriers)

FCC 96-40

CC Docket No. 96-238

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COMMENTS OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL

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Dated: January 6, 1997

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	FCC 96-460
)	
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Formal Complaints Are Filed)	
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**COMMENTS OF THE
AMERICAN PUBLIC COMMUNICATIONS COUNCIL**

The American Public Communications Council ("APCC") submits the following comments in response to the Commission's Notice of Proposed Rulemaking (the "NPRM") issued on November 27, 1996, in the above-referenced proceeding. APCC is a national trade association of more than 1,200 independent public payphone ("IPP") providers, many of which have participated in the formal complaint process.

As IPP providers, APCC members operate their pay telephones independently of the pay telephone operations of the local exchange carrier ("LEC"). Service is provided to the public either by reselling the service of the LEC and interexchange carriers ("IXCs") or by routing calls to such carriers. While some IPP providers operate several thousand payphones, many operate far fewer. Most APCC members operate less than 1000 payphones, and

many as few as 50-100. Especially for these smaller companies, the preparation, filing and litigating of formal complaints imposes a substantial economic and administrative burden. As is recognized in the NPRM, that burden will increase as a result of the proposed changes.

As part of the Telecommunications Act of 1996, Congress added Section 276 to the Communications Act of 1934. Section 276 is designed to fundamentally restructure the payphone industry. It enacts a series of reforms to remove Regional Bell Operating Company ("RBOC") payphones from regulated accounts. Section 276 contains flat prohibitions on Bell Operating Company ("BOC") cross subsidy from regulated revenue accounts and discrimination in favor of RBOC or BOC owned payphone operations.¹ Section 276 also provides for a per call compensation system for payphone service providers ("PSPs").

Section 208 complaints will be the primary vehicle for vindication of the statutory mandates of Section 276. Accordingly, IPP providers have a vital stake in the manner in which the Commission processes Section 208 complaints.

¹The Commission has extended many of the "BOC provisions" of Section 276 to other LECs. See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Dkt. No. 96-128, FCC 96-388 (Rel. Sept. 20, 1996) ("Payphone Order").

I. APCC SUPPORTS THE COMMISSION'S ATTEMPT TO STREAMLINE PROCEDURES FOR PROCESSING FORMAL COMPLAINTS

APCC applauds the Commission's efforts to streamline the process for resolving formal complaints. APCC recognizes that delay has been a problem for all parties in the past and that, given the Act's mandated resolution deadlines, it is essential to develop an expedited process to bring formal complaints to finality as soon as possible.

In these comments, APCC discusses only a few of the specific proposals in the NPRM as they apply specifically to PSPs or IPP providers. In general, APCC agrees with the views expressed by ICG Telecom Group as those views apply to payphones and Section 208 proceedings generally.

II. Complaints Based on Information and Belief and Discovery

As mentioned above, APCC generally shares the concerns expressed by ICG. APCC wishes, however, to make explicit its concerns regarding the relationship between the NPRM's proposals to limit complaints based on information and belief and proposed limitations on discovery in the payphone context. The NPRM (at ¶ 38) seems to make inconsistent suggestions regarding complaints based on information and belief. At the beginning of the paragraph, the NPRM asks whether complainants based solely on information and belief should be prohibited. Later, paragraph 38

also refers to prohibiting complaints containing "assertions based on information and belief." It is unclear therefore, whether the Commission is proposing to eliminate complaints based entirely on information and belief or to eliminate complaints containing any assertions based on information and belief.

The need for discovery and allegations based at least in part on information and belief is particularly acute in instances where cross-subsidy is alleged in particular transactions. Under the Payphone Order, the primary vehicle for preventing cross-subsidy is the Commission's accounting rules. The manner in which a particular transaction is posted on the BOC's/LEC's books determines whether cross-subsidy has occurred. A complainant will not have access to that information.

What the complainant may know is the underlying economic realities and the financial particulars of a transaction. For example, the IPP provider may know that the BOC PSP in question is paying a 45% commission to the location provider, agreed to install all new "smart" payphones, agreed to run wire to remote areas of a location provider's premises, and agreed to charge particular rates for particular calls. The IPP provider will also understand that it is not possible to make a profit on the transaction given the particulars and the economics of maintaining a payphone operation unless, for example, the BOC technician who ran the wire underallocated time improperly to work on the customer's premises,

and/or the BOC technician who installed the payphones did the same, and/or the BOC will be paying commissions to the BOC PSP (for routing operator service calls to the BOC) that are unavailable to other IPPs, etc. In cases such as these, it will have to be sufficient for the IPP provider to state the facts known to the IPP regarding the transaction and the economics of the transaction, allege on "information and belief" that there has been cross-subsidy, and then seek discovery of the BOC books and records regarding the transaction.

In other words, where a party pleads with sufficient particularity facts within the party's knowledge to establish a credible case, the party should be able to rely on assertions of information and belief and to obtain discovery. Articulating a precise standard that defines when information and belief assertions and/or discovery should be allowed is extremely difficult. But caution in developing such a standard is indicated so as not to cut off rights given by the Telecommunications Act of 1996. The Commission should not adopt any standards that must be met before information and belief assertions or discovery is allowed. Rather, the Commission should allow discovery as of right but rely on other procedural reforms to require early discovery and to obtain expedited rulings on this discovery.

III. WAIVERS FOR SMALL BUSINESS

APCC applauds the waiver proposal contained in paragraph 44 of the NPRM. This waiver is particularly important for IPP providers, many of whom are very small companies. The "good cause" standard for such a waiver must be lower than the "good cause" required for a "standard" waiver. See WAIT Radio v. F.C.C. 418 F.2d 1153 (D.C. Cir. 1969); Northeast Cellular Telephone Co., L.P. v. F.C.C. F.2d 1164 (D.C. Cir. 1990). This is particularly so where a party pleads financial hardship; it would avail such a party little to have a waiver standard and procedure whose threshold is too high to be readily met without the expenditure of substantial financial resources. APCC suggests that a party seeking a financial hardship waiver need only certify that it and affiliated companies together have gross revenues of less than \$8,000,000 and gross assets of less than \$20,000,000.

The concomitant of being able to obtain a waiver of the format and content requirements, however, must be that there will be similar relief, from limitations on discovery, etc. Again, a small business or individual complainant will, by necessity, have to rely on the defendant for some information. The Commission staff can exercise control over the discovery process, etc. should that become necessary.

IV. APPLICABILITY OF PROPOSED RULE CHANGES

As stated above, APCC endorses changes in the rules that will reduce delay and produce final resolutions based on full and complete records. The NPRM seeks comment on whether to subject all complaints to the streamlined rules the Commission is proposing to expedite disposition of complaints that must be resolved within a statutory period.

This proposal has much merit. The concomitant of this proposal must, however, be that all complaints will be resolved within the five month period now specified in Section 208(b). The NPRM acknowledges that the new procedures to be adopted will place a much greater burden on complainants. Parties that assume such a burden should be assured that there will in fact be a prompt resolution of their complaint. Complainants should not have to assume these burdens without such assurances.

These considerations suggest that the Commission may want to give Section 208 complainants whose actions are not under a statutorily mandated deadline the option of a less rigorous schedule and less stringent procedural constraints, including relaxed pleading requirements akin to the current standards, enhanced discovery rights, etc. Complainants would then weigh the need for greater discovery and procedures and a less harried timetable against the need for more immediate relief. In any event, the Commission rules should provide that all complaints will

be resolved within nine months of filing.

V. CONCLUSION

Wherefore APCC requests that the Commission consider the foregoing comments and adopt changes in the rules in accordance therewith.

Dated: January 6, 1997

Respectfully submitted,



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